In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1097

EASTERN DIE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 13–14) is reported at 340 F. 2d 607. The Board's decision and order (J.A. 1–10)[1] are reported at 142 NLRB 601.

JURISDICTION

The decision of the court of appeals (Pet. 13–14) was entered on January 25, 1965. The petition for a writ of certiorari was filed on April 23, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "J.A." references are to portions of the record printed as a joint appendix for the court below.

774-769—65

QUESTIONS PRESENTED

1. Whether the attorney for the General Counsel improperly withheld evidence from petitioner prior to the hearing before the Board.

2. Whether the use as evidence of threats of reprisal made by petitioner's manager and foreman violated the First Amendment or Section 8(c) of the Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth at page 15 of the petition.

STATEMENT

Petitioner is engaged in the manufacture, sale and distribution of shoe dies and related products at Auburn, Maine. On June 28, 1962, the Union [2] began a campaign to organize petitioner's production and maintenance employees. During the lunch hour union representatives distributed pamphlets which invited the employees to a meeting that night (J.A. 12; 60–62). Of petitioner's 21 production and maintenance employees, eight attended this meeting and all signed union authorization cards (J.A. 12; 62, 87).

That evening, Plant Manager Bellavance visited the home of employee Frank Kilgore. Bellavance told Kilgore he was aware that union organizers had been to the plant and asked if Kilgore knew anything about it. Kilgore answered that he had been given a pamphlet and knew there was a meeting scheduled

[2] International Union of Electrical, Radio and Machine Workers, AFL–CIO.

for that evening. Bellavance asked for the pamphlet but Kilgore told him he had left it at the plant. Bellavance then inquired whether Kilgore had made plans to attend the organization meeting, and Kilgore said he was not interested (J.A. 12; 113–114). Bellavance left (J.A. 114). When Kilgore came to work the next day, the union pamphlet he had mentioned was missing from his work bench (J.A. 114).

On the following day, employee O'Day was approached by Foreman Joseph Gagnon, who asked if O'Day had attended the union meeting. O'Day, who had in fact attended, answered in the negative. The foreman then asked whether he knew anyone who had gone to the meeting, and O'Day said that he did not. Gagnon then noticed that O'Day had a union leaflet in his hand and warned him, "You'd better not get caught with it, you'd better not let anybody see you with that fool thing" (J.A. 28; 116–117).

During the lunch hour of June 29, the employees who had attended the meeting the previous evening talked with union representatives who were again distributing leaflets in front of the plant (J.A. 12–13; 64, 87, 119). During this conversation Bellavance was seen standing nearby observing the group. Some of the employees overheard Bellavance make heated derogatory comments about the union representatives. Bellavance also stated that the union men ought to return to Massachusetts because it would get the employees in trouble if things continued as they were going (J.A. 12–13; 119–120, 135–136). Thereafter, on the afternoon of June 29 and on the morning of July

9,[3] five of the eight employees who had attended the union meeting and had been seen talking to the union representatives were laid off (J.A. 13–14; 38, 47–48, 50, 65).[4]

The Board found that petitioner violated Section 8(a)(1) of the Act by interrogating and threatening certain of its employees concerning their union activities. The Board also found that petitioner violated Section 8(a) (3) and (1) of the Act by laying off five of its employees because of their union activities and by failing to offer them reinstatement to substantially equivalent positions.[5]

In a *per curiam* opinion, the court of appeals held that the Board's unfair labor practice findings were supported by substantial evidance, and that the Company's defenses had "little merit" and were "groundless." The court enforced the Board's order in full (Pet. 13–14.)

ARGUMENT

The decision of the court below is clearly correct, and there is no conflict of decisions. There is thus no occasion for further review.

1. Petitioner contends (Pet. 2, 7–9) that the attorney for the General Counsel (a) knowingly elicited oral testimony from witness Gagnon, which was contradicted by his earlier affidavit; (b) withheld the

[3] The plant was closed for its annual shutdown between these two dates (J.A. 13).

[4] One other employee who had attended the union meeting was on vacation at the time of these events and never returned to work (J.A. 14; 90).

[5] This finding was affirmed by the court of appeals and petitioner does not challenge it here (Pet. 2–3).

affidavit from petitioner; and (c) failed to correct testimony he knew to be untrue.

The relevant facts, briefly stated, are as follows:

Reginald Gagnon, one of the employees against whom petitioner was alleged to have discriminated, was called as a witness by the General Counsel. He testified on direct examination that, during the June 29 lunch hour, he overheard Plant Manager Bellavance tell an employee, Snow, that, if he valued his job, he should not go near the Union, and that "[t]hose bastards should go back where they belong, to Massachusetts" (J.A. 88–89). On cross-examination, petitioner's counsel obtained and inspected Gagnon's pre-trial statement. He then brought out that the conversation between the employee and Bellavance was not reported in that statement. Gagnon thereupon acknowledged that he must have been mistaken in his direct testimony and said that he must have heard about the conversation "from somebody else, and I figured that I heard it too" (J.A. 103–105). On redirect examination, the attorney for the General Counsel sought to ascertain whether Gagnon had merely forgotten to tell the Board agent about the conversation, but the Trial Examiner cut off the inquiry.*

Another employee testified that he heard Bellavance make a similar threat during the lunch period on

* Only a portion of the colloquy is reprinted at J.A. 110–111. The full colloquy, which appears on pp. 137–138 of the original transcript, reads as follows (Mr. Niro is counsel for the General Counsel and Mr. Wise, counsel for petitioner):

"Q. (By Mr. Niro) Mr. Gagnon, I hand you the affidavit that was referred to by counsel for [petitioner], and I direct

June 29 (J.A. 119–120), and his testimony, which was unshaken on cross-examination, was substantially corroborated by a third employee (J.A. 135–136). In finding that Bellavance had in fact said that the union representatives would get the employees in trouble, the Trial Examiner relied solely upon this testimony and not upon the testimony of Gagnon (J.A. 12–13, 28).

In these circumstances petitioner's suppression claim is plainly insubstantial. First, Gagnon's testimony on direct examination as to Bellavance's remarks during the June 29 lunch hour was not contradicted by his affidavit. Rather, as petitioner's cross-examination showed, the affidavit was silent on that point. Second, Gagnon's affidavit was not withheld from petitioner, but was produced for impeach-

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your attention to the last page. Could you tell me when this affidavit was signed by you? A. 30th day of July, 1962.

"Q. Now, at the time you were interviewed—I notice, how many pages to this affidavit? A. Four pages.

"Q. Now, at the time you were interviewed, did the Board agent ask you a number of questions? A. Yes, he did.

"Q. Did he spend some time with you? A. Yes.

"Q. Approximately how long did he spend with you? A. Oh, about 45 minutes, an hour, something like that.

"Q. Now, is it possible, Mr. Gagnon, that you may have forgotten to tell the Board agent——

"Mr. Wise: I object.

"Q. (By Mr. Niro)—about this incident of what Bellavance said:

"Trial Examiner: Don't answer.

* * * * *

"As I understand the witness' earlier testimony, * * * I think he has, in effect, recanted his statement about hearing Snow have a conversation with Mr. Bellavance, or hearing Mr. Bellavance say something about the union; * * *"

ment purposes on request. See *Jencks* v. *United States*, 353 U.S. 657. Finally, in making his findings of fact as to Bellavance's remarks during the June 29 lunch period, the Trial Examiner relied exclusively on other testimony which had withstood cross-examination and discounted entirely Gagnon's testimony, which he believed to have been repudiated (p. 6 and note 6, *supra*).

2. Equally insubstantial is petitioner's contention (Pet. 10–12) that the evidentiary use of Bellavance's statement that the Union undertaking to organize the plant "would get the boys in trouble," and the statement to employee O'Day by a foreman that he had "better not get caught with a Union leaflet" violated the First Amendment and Section 8(c) of the Act. As the court below properly held (Pet. 14): "Neither § 8(c) of the Act, 61 Stat. 142, 29 U.S.C. § 158(c) nor the First Amendment prohibits the evidentiary use of statements by management which contain a 'threat of reprisal.' See *NLRB* v. *Virginia Electric & Power Co.*, 314 U.S. 469, 477, 478 (1941). When considered with the surrounding facts and circumstances the statements quoted above were properly, indeed necessarily, found to contain such a threat."

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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